UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ZHONGWEI ZHOU *et al.*,

Plaintiffs,

-v-

DOROTHEA WU *et al.*,

Defendants.

No. 14-cv-1775 (RJS)
OPINION & ORDER

RICHARD J. SULLIVAN, District Judge:

Plaintiffs Zhongwei Zhou, Weizhen Song, and Guangly Zhang bring this action against their former employers Dorothea Wu, Felix Wu, Albert Wu, China 1221, Inc., and "XYZ Corporation," alleging violations of federal and state wage-and-hour laws. Now before the Court is Defendants' motion for partial summary judgment with respect to Plaintiffs Song and Zhang on the ground that most or all of their claims are time barred. For the reasons stated below, the Court grants Defendants' motion and dismisses the time-barred claims.

I. Background

A. Facts

Defendants operated two restaurants, both named "China Fun," on the Upper East Side of Manhattan ("China Fun East") and the Upper West Side of Manhattan ("China Fun West").[1]

[1] The following facts are taken from the parties' Local Civil Rule 56.1 Statements, the affidavits and declarations submitted in connection with the instant motion, and the exhibits attached thereto. (Doc. No. 80 ("Def. 56.1"); Doc No. 89 ("Pl. 56.1").) Unless otherwise noted, where one party's 56.1 Statement is cited, the other party does not dispute the fact asserted, has offered no admissible evidence to refute that fact, or merely objects to inferences drawn from that fact. In deciding this motion, the Court also considered Defendants' memorandum of law in support of its motion (Doc. No. 78 ("Mem.")), Plaintiffs' memorandum of law in opposition to the motion (Doc. No. 87 ("Opp'n")), and Defendants' reply brief (Doc. No. 93 ("Reply")).

Plaintiffs are all Chinese immigrants who were employed as delivery workers at Defendants' restaurants at different points between 2005 and 2013. Specifically, Plaintiff Zhou worked at China Fun East from August 21, 2010 until March 31, 2013 (Def. 56.1 ¶ 24); Plaintiff Song worked at China Fun East from May 16, 2006 until March 31, 2007 (*id.* ¶ 25); and Plaintiff Zhang worked at China Fun East from March 1, 2005 until December 5, 2006 and at China Fun West from December 6, 2006 until December 5, 2010 (*id.* ¶ 26). Plaintiffs allege that, while they were employed at the China Fun restaurants, Defendants failed to comply with the Fair Labor Standards Act ("FLSA"), the New York Labor Law ("NYLL"), and related state regulations. Among other things, Plaintiffs allege that Defendants (1) failed to pay Plaintiffs' minimum wage (Doc. No. 74 ("SAC") ¶ 10); (2) failed to pay Plaintiffs' overtime wages for hours worked in excess of forty hours per week (*id.*); (3) never informed Plaintiffs about minimum-wage rates and other wage-and-hour protections (Pl. 56.1 ¶¶ 34–35); (4) fabricated all timekeeping records (*id.* ¶¶ 36–37); (5) failed to provide Plaintiffs with paystubs memorializing their wages (*id.* ¶ 8); and (6) failed to post required wage-related notifications in the restaurants (*id.* ¶¶ 38–39).

B. Procedural History

On November 9, 2012, twenty-seven former employees of Defendants brought suit in a related action before this Court, making very similar allegations and asserting substantially identical claims. (Doc. No. 1, *Sun v. China 1221, Inc.*, No. 12-cv-7135 (RJS).) A jury trial involving three plaintiffs concluded on November 9, 2015 with a favorable verdict for the plaintiffs. (Doc. No. 202, *Sun v. China 1221, Inc.*, No. 12-cv-7135 (RJS).) The Court awarded damages to those three plaintiffs on April 19, 2016 (Doc. No. 245, *Sun v. China 1221, Inc.*, No. 12-cv-7135 (RJS)) and the remaining eighteen plaintiffs on December 16, 2016 (Doc. No. 256, *Sun v. China 1221, Inc.*, No. 12-cv-7135 (RJS)). Proceedings in that case have been automatically stayed since the sole defendant – China 1221, Inc.[2] – filed for bankruptcy. (Doc. No. 279, *Sun v. China 1221, Inc.*, No. 12-cv-7135 (RJS).)

On March 12, 2014, Plaintiffs filed the first complaint in this action, alleging violations of the federal and state labor laws, as well as a New York state law claim for unjust enrichment. (Doc. No. 2.) On June 10, 2016, Plaintiffs filed the Second Amended Complaint, advancing the same claims and adding a claim under the Wage Theft Prevention Act for Zhou. (Doc. No. 74.)

Defendants filed the present motion on June 24, 2016, asserting that the Court should grant summary judgment on the entirety of Song's claims and some of Zhang's claims because they are time barred. (Doc. No. 77.) Plaintiffs responded to Defendants' motion on June 16, 2016, submitting a six-page brief with little more than a page of legal argument. (Doc. No. 87.) The motion was fully briefed when Defendants submitted their reply on July 25, 2016. (Doc No. 93.) In essence, Plaintiffs do not dispute that many of their claims are time barred. However, they request that the Court equitably toll their claims until June 10, 2016, when Plaintiffs most recently amended their complaint (SAC ¶ 146), or, at the very least, until "the end of May" 2013, when they allege they first became "sufficiently aware" of their rights to assert wage-and-hour claims (*id.* ¶ 145). For the reasons set forth below, the Court declines to do so.

II. Legal Standard

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is "no genuine

[2] China 1221, Inc. is also a defendant in this case. As a result, the automatic bankruptcy stay also applies to China 1221 in this action. (Doc. No. 97.)

dispute as to any material fact" where (1) the parties agree on all facts (that is, there are no disputed facts); (2) the parties disagree on some or all facts, but a reasonable factfinder could never accept the nonmoving party's version of the facts (that is, there are no genuinely disputed facts), *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); or (3) the parties disagree on some or all facts, but even on the nonmoving party's version of the facts, the moving party would win as a matter of law (that is, none of the factual disputes are material), *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In determining whether a fact is genuinely disputed, the court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir. 1996). Nevertheless, to show a genuine dispute, the nonmoving party must provide "hard evidence," *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998), "from which a reasonable inference in [its] favor may be drawn," *Binder & Binder PC v. Barnhart*, 481 F.3d 141, 148 (2d Cir. 2007). "Conclusory allegations, conjecture, and speculation," *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998), as well as the existence of a mere "scintilla of evidence in support of the [nonmoving party's] position," *Anderson*, 477 U.S. at 252, are insufficient to create a genuinely disputed fact. A moving party is "entitled to judgment as a matter of law" on an issue if (1) it bears the burden of proof on the issue and the undisputed facts meet that burden; or (2) the nonmoving party bears the burden of proof on the issue and the moving party "'show[s]' – that is, point[s] out . . . – that there is an absence of evidence [in the record] to support the nonmoving party's [position]," *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

III. Discussion

The lapse of the statute of limitations on a plaintiff's claim is an affirmative defense that a defendant must plead and prove. *See Staehr v. Hardford Fin. Servs. Grp.*, 547 F.3d 406, 426 (2d Cir. 2008). The statute of limitations for a claim for unpaid minimum wages or unpaid overtime compensation under the FLSA is two years after the claim accrued, unless the FLSA violation was willful, in which case the statute of limitations is three years. *See* 29 U.S.C. § 255(a). The statute of limitations for a wage claim under the NYLL is six years, *see* N.Y. Lab. Law §§ 198(3), 663(3), 681(3), and the statute of limitations for an unjust enrichment claim under New York law is six years, *see Golden Pac. Bancorp v. F.D.I.C.*, 273 F.3d 509, 518 (2d Cir. 2001) (citing N.Y. C.P.L.R. § 213(1)).

Nevertheless, the doctrine of equitable tolling allows courts to extend a statute of limitations on a case-by-case basis to prevent inequity. *See Warren v. Garvin*, 219 F.3d 111, 113 (2d Cir. 2000). However, equitable tolling is allowed only in "rare and exceptional circumstances" in which a party "is prevented in some extraordinary way from exercising his rights." *Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 80 (2d Cir. 2003) (citations omitted); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96–97 (1990) ("Federal courts have typically extended equitable relief only sparingly in suits against private litigants, allowing tolling where the claimant has actively pursued his judicial remedies by filing a defective pleading or where he has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."). To establish the need for equitable tolling, a plaintiff must establish that (1) "some extraordinary circumstance stood in his way and prevented timely filing," and (2) "he has been pursuing his rights diligently." *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (internal quotation marks omitted). When deciding the second element – whether a plaintiff acted with reasonable diligence under the circumstances – a court may consider (i) the party's "efforts at the earliest possible time to secure counsel," (ii) the party's lack of education or funds to consult a lawyer, and (iii) the party's "direct access to other forms of legal assistance." *Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003). "The burden of demonstrating the appropriateness of equitable tolling, however, lies with the plaintiff." *Boos v. Runyon*, 201 F.3d 178, 185 (2d Cir. 2000).

There is no dispute that (1) Plaintiff Song stopped working at Defendants' restaurants on March 31, 2007 (Def. 56.1 ¶ 25), (2) Plaintiff Zhang stopped working at Defendants' restaurants on December 5, 2010 (*id.* ¶ 26), and (3) Plaintiffs brought suit on March 14, 2014 (*id.* ¶ 23). Thus, Song's FLSA and NYLL claims and Zhang's FLSA claims are time barred unless they can satisfy the requirements of equitable tolling.

A. Extraordinary Circumstances

In arguing that they are entitled to equitable tolling of their otherwise time-barred claims, Plaintiffs make much of the fact that Song and Zhang are poor immigrant workers who do not speak English. (*See* Pl. 56.1 ¶¶ 31–33.) But as the Court found when denying equitable tolling in the related *Sun* action, "the law is clear that lack of education, limited financial means, and ignorance of the law are not extraordinary circumstances that justify equitable tolling." *Sun v. China 1221, Inc.*, No. 12-cv-7135 (RJS), 2015 WL 5542919, at *7 (S.D.N.Y. Aug. 12, 2015); *see also Wen Liu v. Mount Sinai Sch. of Med.*, No. 09-cv-9663 (RJS), 2012 WL 4561003, at *5 (S.D.N.Y. Sept. 24, 2012), *aff'd sub nom. Wen Liu v. Mount Sinai Sch. of Med. & Agents*, 559 F. App'x 106 (2d Cir. 2014). Thus, "[m]ere ignorance of the law is . . . insufficient to delay the accrual of the statute of limitations." *Ormiston v. Nelson*, 117 F.3d 69, 72 n.5 (2d Cir. 1997).

Plaintiffs nevertheless insist that this case is distinct from the situation in *Sun* since they allege that Defendants here went to extraordinary lengths to keep Plaintiffs ignorant of their legal rights. For example, Plaintiffs assert that Defendants failed to (1) properly record their time (Pl. 56.1 ¶¶ 6–13, 15); (2) provide paystubs that included information about pay rates and withholding taxes (*id.*); and (3) post the required notifications informing workers of their rights under federal and state labor law (*id.* ¶¶ 16, 18–21). Plaintiffs also contend that Defendants intentionally concealed the fact that the New York Department of Labor was investigating Defendants' alleged state labor law violations, which began in 2007. (*Id.* ¶ 40.) But as this Court noted in *Lin v. Chinese Staff & Workers Association*, "Second Circuit authority evinces a clear pattern: the doctrine of fraudulent concealment applies where the alleged fraud concerns a factual predicate of a plaintiff's cause of action but not where it concerns the state of the law." No. 11-cv-3944 (RJS), 2012 WL 5457493, at *7 (S.D.N.Y. Nov. 8, 2012), *aff'd*, 527 F. App'x 83 (2d Cir. 2013).

Here, there can be no doubt that Plaintiffs were aware of what they were paid and how many hours they worked each pay period, regardless of whether they received proper paystubs. Song claims that he worked at least 66 hours per week and that he knew he received a regular monthly salary of $450. (Doc. No. 90, Ex. C ("Song Decl.") ¶¶ 6, 11.) Zhang likewise acknowledges that he worked more than 66 hours each week and was allegedly paid a monthly salary of $350. (Doc. No. 90, Ex. B ("Zhang Decl.") ¶¶ 9–10.) The parties do not contest that before June 10, 2007, employees were required to sign a document memorializing their wages each pay period – a practice that Plaintiffs claim continued after June 10, 2007. (Pl. 56.1 ¶¶ 6, 8.) Nor do Plaintiffs dispute that after October 2010, employees started signing timecard reports, which included information about overtime hours. (Def. 56.1 ¶ 13; Doc. No. 82, Ex. A-4.) Thus, assuming Plaintiffs' knowledge of the law, as it must, the Court finds that Plaintiffs were fully aware of the facts necessary to bring these wage-and-hour claims.

Notwithstanding their obvious knowledge of the hours they worked and the wages they were paid, Plaintiffs essentially argue that Defendants kept them in the dark about their rights under federal and state law. (Opp'n 5–6.) Again, knowledge of the law is ordinarily presumed, and absent allegations that defendants took affirmative steps to mislead plaintiffs about the state of the law, courts have generally been reluctant to treat defendant's failure to notify employees of the wage-and-hour laws as sufficient to establish fraudulent concealment for reasons of equitable tolling purposes. As Judge Buchwald noted in another FLSA case, "[a]n employer's failure to tell a plaintiff of her legal rights is not by itself sufficient to justify equitable tolling; the employer or some other exceptional circumstance must have actually prevented the exercise of plaintiff's legal rights in some way. To hold otherwise would be tantamount to holding that the statute of limitations should be tolled in nearly every wage-and-hour case." *Upadhyay v. Sethi*, No. 10-cv-8462 (NRB), 2012 WL 3100601, at *2 (S.D.N.Y. July 31, 2012) (citations omitted). And in the Eastern District, Judge Kuntz likewise concluded that "plaintiff's sole basis for equitable tolling is defendants' failure to post notices or provide plaintiff with statements of hours worked and wages earned. This is an insufficient basis for equitable tolling, as it would provide for equitable tolling whenever a defendant violated FLSA and NYLL by failing to post notices or provide statements of hours and wages." *Xu v. Ho*, 111 F. Supp. 3d 274, 279 (E.D.N.Y. 2015) (citation omitted); *see also Copantitla v. Fiskardo Esitatorio, Inc.*, 788 F. Supp. 2d 253, 319 (S.D.N.Y. 2011) (requiring allegations of deception beyond failure to post notices); *cf. Mazurkiewicz v. N.Y.C. Health & Hosps. Corp.*, 356 F. App'x 521, 522–23 (2d Cir. 2009) (quoting *Smith v. Am.*

President Lines, Ltd., 571 F.2d 102, 111 (2d Cir. 1978), for the proposition that, in the Title VII context, "failure to post notices . . . does not . . . allege misleading, fraudulent, or deceptive conduct by the appellees sufficient to permit tolling here"); *Zerilli-Edelglass*, 333 F.3d at 80 (stating that equitable tolling generally requires a showing that plaintiff was ignorant of his cause of action "*due to* [the] misleading conduct of the defendant").[3] Put simply, Plaintiffs have alleged no facts suggesting that they were induced or tricked by their adversaries' misconduct into "allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. Indeed, since Song stopped working for Defendants in 2007 and Zhang stopped working for Defendants in 2010, it is difficult to see how Plaintiffs' failure to bring suit until 2014 can be attributed to Defendants. And since "lack of education, limited financial means, and ignorance of the law are not extraordinary circumstances that justify equitable tolling," *Sun*, 2015 WL 5542919, at *7, the Court finds that Plaintiffs have not established the first prong of the test for equitable tolling.

B. Reasonable Diligence

But even if Plaintiffs could succeed in demonstrating the existence of exceptional circumstances and fraudulent concealment by Defendants, Plaintiffs would still not be entitled to equitable tolling, since they have offered no evidence to demonstrate that they diligently pursued their legal rights under the circumstances. *See Koch v. Christie's Intern. PLC*, 699 F.3d 141, 157 (2d Cir. 2012) ("Reasonable diligence is a prerequisite to the applicability of equitable tolling.").

[3] While the Court has identified at least two cases in this District that have determined that a failure to post notices alone is sufficient to justify equitable tolling – *see*, *Kim v. Gang, Inc.*, No. 12-cv-6344 (MHD), 2015 WL 2222438, at *36–39 (S.D.N.Y. Mar. 19, 2015); *Ke v. Saigon Grill, Inc.*, 595 F. Supp. 2d 240, 258–59 (S.D.N.Y. 2008) – the Court does not find those decisions to be persuasive since they appear to be contrary to Second Circuit and Supreme Court caselaw on what constitutes extraordinary circumstances, and they seem to entirely ignore the reasonable diligence prong of the equitable tolling test.

Again, the record is undisputed that Plaintiffs Song and Zhang waited many years after leaving China Fun to file suit. Specifically, Song waited for almost seven years and Zhang waited more than three years after departing Defendants' employ before bringing this action. This lengthy delay in bringing suit, or even in investigating their potential claims, cannot be characterized "as anything other than a marked lack of diligence." *See Warren v. Garvin*, 219 F.3d 111, 113–14 (2d Cir. 2000) (rejecting request for equitable tolling where Plaintiff waited nearly two years before filing suit). Thus, even if the Court were to credit the assertion that Defendants somehow prevented Plaintiffs from learning about their right to sue, the lack of activity in moving their cases forward *after* leaving their jobs at China Fun undermines the suggestion that Defendants were responsible for Plaintiffs failure to file claims before the statutes of limitations had lapsed. *See Hizbullahankhamon v. Walker*, 255 F.3d 65, 75 (2d Cir. 2001), *cert. denied* 536 U.S. 925 (2002) ("[I]f the person seeking equitable tolling has not exercised reasonable diligence in attempting to file after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken, and the extraordinary circumstances therefore did not prevent timely filing." (emphasis omitted)).

Tellingly, the record reflects that Plaintiffs had suspicions that they were being cheated and that the China Fun ownership and management were violating the law. For example, Zhang admitted to having a contemporaneous understanding that the Defendants were "cheat[ing] the government," which made him "really upset." (Doc. No. 90, Ex. B ("Zhang Decl.") ¶ 24.) When China Fun installed a time clock and fingerprint scanner in March 2009 (*see* Def. 56.1 ¶ 10), Zhang was aware that he and other delivery workers were required to check in and out at times that did not reflect their actual work hours. (*See* Zhang Decl. ¶ 24.) Song similarly acknowledged his suspicions, admitting that, in his view, bringing an action against Defendants would have been futile, since "everyone knew that the owners would make up anything to let whoever dared to sue them to lose the lawsuit." (Doc. No. 90, Ex. C ("Song Decl." ¶ 21.) By Plaintiffs' own admissions, they were aware of the facts underlying their claim and were at least suspicious that Defendants were engaged in illegal behavior, but they did not take steps to vindicate their rights until long after the statute of limitations period had run. This alone constitutes a failure to prove reasonable diligence. *See Koch*, 699 F.3d at 157 (holding that four-year failure to investigate claims after plaintiff learned of relevant facts that piqued his suspicions was not reasonably diligent).

Plaintiffs' lack of diligence in pursuing their rights is further demonstrated by the passage of time between when they claim to have first learned of their legal rights and when they actually filed their claims. Specifically, Song asserts that he learned of his rights under the FLSA and NYLL from three former coworkers and an attorney in 2012 (*see* Doc. No. 82, Ex. F ("Song Dep.") 49:19–50:5, 53:24–54:7), while Zhang alleges that he first learned of his rights under the labor laws, and obtained a lawyer's contact information, from a former coworker in 2013 (*see* Doc. No. 82, Ex. E ("Zhang Dep.") 74:16–21). Even assuming the truth of these statements, the fact remains that when Plaintiffs first learned of their rights and came into contact with attorneys, Song's NYLL claims and all of Zhang's claims were still timely. Yet Plaintiffs inexplicably waited until March 2014 to file their complaint. (*See* Doc. No. 1.) And while Plaintiffs contend that they began pursuing their legal rights even before they actually filed this lawsuit in March 2014 – as evidenced by their inclusion in the Rule 26 initial disclosures filed in the *Sun* case in June 2013 (*see* Doc. No. 26, *Sun v. China 1221 Inc.*, No. 12-cv-7135 (RJS)), and receipt of a Rule 68 offer of judgment along with the *Sun* plaintiffs in November 2013 (*see* Doc. No. 60, Ex. C, *Sun v. China 1221 Inc.*, No. 12-cv-7135 (RJS)) (*See* Pl. 56.1 ¶ 22) – neither Plaintiffs' inclusion in discovery disclosures nor their receipt of an offer of judgment supports an inference that they were diligently pursuing their claims. To the contrary, it demonstrates that Plaintiffs continued to take a passive approach to their years-old claims without bothering to bring suit. *See Baldayaque*, 338 F.3d at 153 ("[T]he district court should ask: did the petitioner act as diligently as reasonably could have been expected *under the circumstances?*"); *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) (concluding that a showing of reasonable diligence cannot be made if the claims "could have [been] filed on time notwithstanding the extraordinary circumstances").

In short, Plaintiffs waited years before bringing this case. The record reflects that they failed to exercise reasonable diligence in pursuing the facts and investigating their suspicions while their claims were still timely, and that they were no more diligent even after they became aware of their legal rights and were in contact with attorneys. Based on the record before it and drawing all inferences in favor of Plaintiffs, the Court finds that Song and Zhang have not satisfied their high legal burden and declines to impose the "rare and exceptional" remedy of equitable tolling with respect to their time-barred claims. *See Zerilli-Edelglass*, 333 F.3d at 80.

IV. Conclusion

For the foregoing reasons, the Court rejects Plaintiffs' request for equitable tolling and grants Defendants' motion for summary judgment with respect to Plaintiffs Song and Zhang's time-barred claims. Because Plaintiff Song has no remaining timely claims, the Clerk of the Court is respectfully directed to dismiss him from this action. The Clerk of the Court is also respectfully directed to terminate the motion located at docket number 77.

IT IS FURTHER ORDERED THAT by April 14, 2017, the parties shall submit to the Court a proposed case management plan and scheduling order with respect to the remaining discovery in this case. A template for the order is available at: http://www.nysd.uscourts.gov/judge/Sullivan.

SO ORDERED.

Dated: March 31, 2017
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

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